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No. 02-1314

IN THE

Supreme Court of the United States

STATE OF KANSAS, *et al.*,
Petitioners,

v.

CHEROKEE ROBINSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

FACTUAL BACKGROUND

This case concerns the method by which State of Kansas provides funding for its public schools. It is largely a centralized system. The State provides a base rate of $3,863 per student per year. App. 11a ¶ 33. It supplements that base rate in two ways relevant to this action:

- Low enrollment weighting, in which districts with less than 1725 students receive additional funds, in some cases more than twice as much per student as districts receiving the base rate. App. 110a-111a ¶ 34.
- Local option budgets, in which districts may levy taxes on local taxpayers. App. 112a ¶ 41.

Most plaintiffs/respondents are Hispanic, Asian-American or African-American students. App. 106a-08a ¶¶ 1-11. Five of them are disabled as defined in the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* and the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* App. 106a-08a ¶¶ 3; 5; 9; 12. They all attend public school in Unified Schools Districts 305 or 443. App. 106a-08a ¶¶ 1-12.

Hispanic, Asian-American and African-American students (and other students of non-U.S. origin) are typically concentrated in large and mid-size school districts, like Districts 305 and 443, that do not qualify for low enrollment weighting. App. 111a ¶¶ 35-36. Likewise, disabled students are typically concentrated in large or mid-size school districts that do not qualify for low enrollment weighting. App. 111a ¶ 37.

There is a direct correlation between the wealth of a school district and that district's ability to raise funds under a local option budget. App. 112a-13a ¶ 41. Hispanic, Asian-American and African-American students (and other students of non-U.S. origin) are typically concentrated in poor school districts, like Districts 305 and 443, that have low or nonexistent local option budgets. App. 113a ¶¶ 42-43. Likewise, disabled students are typically concentrated in poor school districts that have low or nonexistent local option budgets. App. 113a ¶ 44.

As a result, the Kansas school funding formula has a disparate impact on disabled students, as well as Hispanic, Asian-American and African-American students (and other students of non-U.S. origin). There is a direct correlation between these funding disparities and the unsatisfactory education which these students receive. App. 112a ¶ 40; 113a ¶ 45.

This action seeks prospective injunctive relief to redress these deficiencies under numerous different legal theories. Those relevant to the instant petition arise under § 504 of the

Rehabilitation Act, 29 U.S.C. § 794 and § 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, and its implementing regulations. Basically, these statutes and regulations prohibit the States from using federal funds, such as education funds, in a manner which has a disparate impact on students based on their race, disability, or national origin.

ARGUMENT

I. THE COURT SHOULD DENY THE PETITION BECAUSE A RULING WOULD NOT HAVE ANY REAL PRACTICAL EFFECT ON THE LITIGATION.

Whatever the merit of the State's arguments, this case presents a singularly poor vehicle for resolving them. The issues the State raises in its petition are alternative theories for the relief that Respondents seek. Other legal theories, no longer challenged by the State, permit Respondents to seek that relief whether or not their position on the State's issues is right or wrong. Thus, a grant of certiorari would have no practical effect on the case.

The State's first issue inquires whether Respondents can enforce the disparate impact rule of Title VI in an action under 42 U.S.C. § 1983. As the court of appeals found, App. 4a, Respondents can "bring a disparate impact claim under section 504 of the Rehabilitation Act," and Petitioners "do not contend otherwise." The enforceability of Title VI via a § 1983 action makes no practical difference to the outcome.

Moreover, the State has waived this claim by failing to brief it below. The issues it briefed in the court of appeals related exclusively to its claims of sovereign immunity and abstention, not whether Respondents could enforce their Title VI rights in a § 1983 claim. "Ordinarily, this Court does not decide questions not raised or resolved in the lower courts." *Taylor v. Freeland and Kronz*, 503 U.S. 638, 646 (1992) (citations and internal punctuation omitted).

The State's second issue inquires whether the State waived its Eleventh Amendment immunity by accepting funds pursuant to 42 U.S.C. § 2000b-7. The only relief sought by Respondents, however, is prospective injunctive relief prohibiting defendants from distributing school funds in violation of federal law. App. 137a. As the court of appeals held, App. 10a, "the *Ex Parte Young* doctrine permits suits seeking prospective injunctive relief against state officials acting in their official capacity." The State has not attempted to challenge that part of the court of appeals' holding, which will now be the law of the case. Once again, it makes no practical difference to this lawsuit whether § 2000b-7 effectively waives the State's Eleventh Amendment immunity.

In effect, the State is asking this Court for an advisory opinion. When the issues presented "could not affect the judgment," those issues "would therefore be advisory." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991):

> [N]either counsel identified any way in which the interests of his client would be advanced by a favorable decision on the merits—except, of course, for the potential benefit that might flow from an advisory opinion. Because it is not the business of this Court to render such opinions, it wisely decides to dismiss a petition that should not have been granted in the first place.

Montana v. Imlay, 506 U.S. 5, 6 (1992) (Stevens, J., concurring).

II. THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENTS COULD ENFORCE THEIR RIGHTS UNDER § 602 OF THE 1964 CIVIL RIGHTS ACT VIA A § 1983 CLAIM.

42 U.S.C. § 1983 provides a private right of action against any actor under color of state law who deprives the plaintiff of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. In *Blessing v.*

Freestone, 520 U.S. 329 (1997), this Court set forth a three-part test to determine whether a particular statute creates a right that can be enforced under § 1983:

A. "Congress must have intended that the provision in question benefit the plaintiff."

B. The right thus created "is not so 'vague and amorphous' that its enforcement would strain judicial competence."

C. The statute must "unambiguously impose a binding obligation on the States."

520 U.S. at 340-41.

In applying the *Blessing* test, this Court has always considered the language of regulations implementing the statute. In *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418 (1987), the statute limited the percentage of a tenant's income that a public housing authority could collect in rent. It also required the authority to make a "reasonable" allowance for utilities. The Housing Authority claimed that the statute was too vague to create enforceable rights under § 1983. In rejecting that argument, this Court expressly relied on the regulations:

> The regulations, however, defining the statutory concept of "rent" as including utilities, have the force of law, . . . they specifically set out guidelines that the PHAs were to follow in establishing utility allowances . . . . In our view, the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under Pennhurst and § 1983 . . . .

479 U.S. at 431-32. *Accord*, *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 511 (1990) (statute "and its implementing regulations did create rights enforceable under § 1983"); *Suter v. Artist M*, 503 U.S. 347, 361 (1992) (regulations "do not evidence a view that § 671(a) places any requirement for

state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary").

Common sense dictates that this must be the rule. Section 1983 is a broad statute that "must be given a liberal construction." *Lake County Estates, Inc. v. Tahoe Regional Planning Auth.*, 440 U.S. 391, 399-400 (1979). The statute applies to "rights . . . secured by . . . laws," not just rights secured by statutes. As *Wright* observed, regulations have the force of law. Moreover, Congress often delegates substantial discretion to administrative agencies. Unless courts consider regulations as well as the statute, then the broader the grant of authority to the agency the less likely it is that there will be enforceable rights. As a matter of policy, this is absolutely backward.

Taken together, § 602 and the implementing regulations clearly satisfy the *Blessing* standards. Section 602 is a broad grant of authority:

> To effectuate the provisions of section [601] . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1. 34 C.F.R. § 100.3(a) provides:

> No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

34 C.F.R. § 100.3(b)(vii)(2) provides:

> A recipient [of federal funds] . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . .

34 C.F.R. § 100.1 provides that the purpose of the regulations is to assure:

> that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance from the Department of Education.

The State has never suggested that these regulations are beyond the congressional grant of authority to the Department of Education. Thus, the statute and its implementing regulations confer on minorities the right to be free from discrimination, including methods of administration that have a disparate impact. Those provisions were unquestionably intended for the benefit of persons like Respondents.

Section 602 and its implementing regulations are at least as clear in the rights they create as the statute at issue in *Wilder*. There, the statute required states to provide assurances that their rates for Medicaid reimbursement were "reasonable and adequate" to compensate service providers. This Court held that there was "little doubt that health care providers are the intended beneficiaries" of that provision. 496 U.S. at 510.

A prohibition against disparate impact discrimination will not strain judicial competence; this Court has long recognized that Title VII of the 1964 Civil Rights Act prohibits such discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). And the absolute prohibition against such discrimination clearly imposes a binding obligation on the recipients of such funds. In developing a school funding formula that creates such discrimination, the State has plainly violated Respondents' rights.

It is true that a badly divided Third Circuit panel reached the opposite conclusion in *South Camden Citizens in Action v. New Jersey Dep't of Environmental Protection*, 274 F.3d 771

(3rd Cir.), *cert. denied*, ___ U.S. ___, 122 S. Ct. 2621 (2002). This Court has rarely found it appropriate to devote its scarce resources to resolving a conflict between two circuit courts.[1] One can confidently expect numerous opportunities in future years for either circuit to reconsider, or for other circuit courts to weigh in on the topic. Especially when the State did not even bother to brief the issue below, there is no need for this Court to intervene at this time.

The State cites *Sandoval* for the proposition that a regulation may not "create a right that Congress has not." Pet. at 9, *quoting Sandoval*, 532 U.S. at 291. The "right" in question in *Sandoval* was "a private right of action." *Id.* The issue here is whether the combination of the statute and the regulation confer a right to sue under § 1983. That is "a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute." *Wilder*, 496 U.S. at 508 n.9. Because "Congress rather than the courts controls the availability of remedies for violations of statutes," the Court imposes a higher burden on those who seek to imply a private cause of action. *Id.*:

> Because § 1983 provides an alternative source of express congressional authorization of private suits, . . . these separation of powers concerns are not present in a § 1983 case.

496 U.S. at 508 n.9.

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[1] The other circuit court cases the State cites do not involve Title VI, and hence are essentially irrelevant.

III. THE COURT OF APPEALS CORRECTLY HELD THAT, BY ACCEPTING FUNDS UNDER TITLE VI AND THE REHABILITATION ACT, THE STATE WAIVED ITS ELEVENTH AMENDMENT IMMUNITY.

42 U.S.C. § 2000d-7(a)(1) contains "an unambiguous waiver of the States' Eleventh Amendment immunity," *Lane v. Pena*, 518 U.S. 187, 200 (1996)—a waiver that explicitly covers both Title VI and the Rehabilitation Act. The court of appeals held that, "by accepting federal financial assistance" under both statutes, "states and state entities waive sovereign immunity from suit." App. 8a-9a.

As the State concedes, Pet. at 10, the great weight of authority supports this holding:

> Congress, in enacting 42 U.S.C. § 2000d-7(a)(1), permissibly conditioned GMU's receipt of Title IX funds on an unambiguous waiver of GMU's Eleventh Amendment immunity, and that, in accepting such funding, GMU has consented to litigate Litman's suit in federal court.

Litman v. George Mason University, 186 F.3d 544, 555 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000). *Accord, Pederson v. Louisiana State University*, 213 F.3d 858, 876 (5th Cir. 2000); *Nihiser v. Ohio Environmental Protection Agency*, 269 F.3d 626, 628 (6th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 2588 (2002); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. en banc 2000), *cert. denied*, 533 U.S. 949 (2001); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997); *Sandoval v. Hagan*, 197 F.3d 484, 494 (11th Cir. 1999), *rev'd on other grounds*, 532 U.S. 275 (2001).

The State claims a circuit conflict based on *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), and the opinion in *Douglas v. California Dep't of Youth*

Authority, 285 F.3d 1226 (9th Cir. 2002), dissenting from denial of rehearing en banc. These opinions are entirely consistent with the majority rule.

Both plaintiffs sought damages for alleged violations of the Rehabilitation Act. In each case, the operative facts occurred before this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Prior to that decision, it was "reasonably understood" that Congress had "abrogate[d] New York's sovereign immunity under Congress' Commerce Clause authority." *Garcia*, 280 F.3d at 114. As a result, the State could not have *knowingly* waived its immunity by accepting funds, because the State did not know it had such immunity:

> [A] state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damage suits, . . . since by all reasonable appearances state sovereign immunity had already been lost.

Id.; *Douglas*, 285 F.3d at 1229.

Whatever the merit of that reasoning, it has nothing to do with Respondents' claim. By 1999, when Respondents filed their lawsuit, the State would reasonably have understood that Congress could not abrogate its Eleventh Amendment immunity under the commerce clause. Thus, the State faced a choice: accept federal funds conditioned on a waiver of its known right to Eleventh Amendment immunity or retain the immunity and decline the proffered funds. By choosing the funds, the State made a knowing decision to waive its immunity. Each year that this action remains pending, the State has had or will have exactly the same choice.

The State's suggestion that the court of appeals' opinion somehow contradicts *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666 (1999), Pet. at 13-17, borders on the frivolous. *College*

Savings held that Congress could not waive the States' immunity merely by giving notice that further participation by the States in some kind of activity would subject them to suit; that kind of "constructive-waiver" was invalid. 527 U.S. at 680.

College Savings recognizes that the instant case presents a "fundamentally different" situation, of which the opinion expressly approves. 527 U.S. at 686:

> Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions.

Id. This Court has endorsed that rule since at least *State of Oklahoma v. U.S. Civil Service Com'n*, 330 U.S. 127, 143 (1947), and it is precisely what the court of appeals held in the instant case.

CONCLUSION

For these reasons, Respondents respectfully pray that the Court deny the petition for writ of certiorari.

Respectfully Submitted,

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